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No. 91-1545

IN THE

Supreme Court of the United States

October Term, 1991

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Petitioner,

v.

TURNER BROADCASTING SYSTEM, INC. et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF IN SUPPORT OF ASCAP'S PETITION FOR A WRIT OF CERTIORARI

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The American Society of Composers, Authors and Publishers (ASCAP) submits the following reply to respondents' arguments:

1. Respondents miss the point. The issue is not whether the courts below recited the correct quotations from the correct cases on consent decrees. The point is that, while saying one thing, the courts did quite another. The courts gave themselves liberty to rewrite a totally unambiguous decree, simply by declaring it ambiguous. It is as if a court, after citing the appropriate cases on the First Amendment and prior restraints, nonetheless imposed a prior restraint simply by declaring it not to be a prior restraint. Surely that is a departure from the accepted and usual course of judicial proceedings that warrants this Court's review.

Respondents complain that ASCAP "cites no specific language in the Decree" to support its position. (Resp. Br. at 17.) On the contrary, ASCAP relies entirely on the specific language of

the Decree. When, in 1950, ASCAP and the Department of Justice used the terms "telecasting network" and "stations . . . affiliated" with such networks, they clearly were referring to the only type of telecasting network that existed at the time (or now, for that matter) — over-the-air broadcast networks like ABC, CBS, and NBC.

It is respondents whose interpretation lacks Decree support. They seek to have Section V(A) apply to them because they are purportedly "functionally identical" to over-the-air networks, who are their competitors, and because cable system operators are purportedly "functionally indistinguishable" from television stations affiliated with the over-the-air networks. (Resp. Br. at 8-9.) As discussed in our petition, cable services and system operators in fact are significantly different from networks and their affiliated stations. (ASCAP Pet. at 7.) But even if they were "functionally" equivalent, cable services still would not be covered by Sections V(A) and VII(B). Those sections speak only of "telecasting network[s]" and "television broadcaster[s]" — their "functional equivalents" are nowhere mentioned. This Court rejected precisely this type of decree interpretation by analogy in *United States* v. *Armour & Co.*, 402 U.S. 673, 680-82 (1971).

Because they ignore this critical point, respondents ignore also the considerations making this case worthy of this Court's review. By expanding the scope of the Decree beyond what the parties could possibly have intended, the courts below set a dangerous precedent that is likely to discourage parties from entering consent decrees.

2. Rather than relying on the language of the Decree, respondents resort to a "policy" argument, as did Magistrate Judge Dolinger. They argue repeatedly that applying Sections V(A) and VII(B) to cable services furthers the "policy objectives" and "purpose" of the Decree. (*E.g.* Resp. Br. at 5, 17.)

Like Magistrate Judge Dolinger, respondents thus ignore the fundamental principle of decree interpretation: A "*decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies

as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *Armour*, 402 U.S. at 681-2 (emphasis in original).

3. Respondents seek to muddy the issue by arguing that the "purpose" of the Decree provisions at issue was to offset alleged "market power" of ASCAP. (Resp. Br. at 3, 5.) They contend that ASCAP has unfair power because cable system operators purportedly have no control over the music in material supplied to them by cable services. (Resp. Br. at 9.)

Nothing supports this theory. Respondents are simply recycling the exact same theory that the Second Circuit twice rejected, first in *Columbia Broadcasting System, Inc.* v. *ASCAP*, 620 F.2d 930 (2d Cir. 1980) ("*CBS*"), *cert. denied*, 450 U.S. 970 (1981), when asserted by a television network, and again in *Buffalo Broadcasting Co.* v. *ASCAP*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985), when asserted by local television stations.

ASCAP cannot exercise market power over cable system operators or any other user. Section IX(A) of the AFJ guarantees that any user of ASCAP music that objects to the fees requested by ASCAP can seek court determination of a reasonable fee, in a proceeding in which ASCAP bears the burden of showing reasonableness. (ASCAP Pet. App. at 100a.)

Moreover, like the television networks and local stations, cable system operators do not need to obtain licenses through ASCAP. An operator is free to obtain performance rights directly from ASCAP members, or it can require the cable services supplying its programs to do the same. Sections IV(A) & (B) of the AFJ guarantee that ASCAP will not interfere with any music user's right to obtain performance licenses in this manner. (ASCAP Pet. App. at 95a.) The availability of these alternatives to an ASCAP license, confirmed by the Second Circuit in *Buffalo Broadcasting* and *CBS*, precludes any argument that ASCAP has "market power."

In any event, the entire market power argument is an irrelevant diversion. ASCAP is required to offer the special forms of license provided for in Sections V(A) and VII(B) only to the businesses to which it *agreed* to offer those licenses. As this Court stated in *Armour*:

> [T]he scope of a consent decree must be discerned within its four corners . . . . Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written . . . .

402 U.S. at 682.

CONCLUSION

For the reasons stated above and in ASCAP's petition, the Court should grant certiorari.

Respectfully submitted,

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